

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0536

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

MARTIN MULIPA IOSEFO,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable John W. Larson, Presiding

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
KATIE F. SCHULZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
kschulz @mt.gov

JAMES P. O'BRIEN
O'Brien Law Office, P.C.
P.O. Box 7936
Missoula, MT 59801-7936

ATTORNEY FOR DEFENDANT
AND APPELLANT

JIM NUGENT
Missoula City Attorney
GARY HENDRICKS
Senior Deputy City Attorney
435 Ryman
Missoula, MT 59801

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUE

Whether the municipal court erred in denying the Defendant's motion to suppress on the grounds that he was unlawfully arrested pursuant to the citizen arrest statute by an out-of-jurisdiction peace officer.

STATEMENT OF THE CASE

On August 25 and 26, 2012, Mark Fiorentino (Fiorentino), an off-duty Ronan City Police Officer, was working as a security guard for an event in downtown Missoula. (Doc. 1 at 19-21, attached as App. 1.)¹ After observing a vehicle drive through yellow caution tape in the parking garage and into the area roped off for festival pedestrians and concessionaire booths, Fiorentino tried to detain the driver as he called 911 for assistance. (*Id.*) After the city police officers arrived, the driver, Martin Iosefo (Iosefo), was arrested for aggravated DUI, unlawful breath test refusal, and careless driving. (*Id.*)

Iosefo filed a motion to suppress, arguing he was unlawfully arrested because Fiorentino did not have sufficient probable cause to effectuate a citizen's arrest. (App. 1.) Following an evidentiary hearing the municipal court denied the motion and Iosefo appealed to the district court. (*Id.*) The district court affirmed

¹ The Municipal Court Record is a 116 page "pdf" file found at Doc. 1 of the electronically filed District Court Record. For convenience, citations to Municipal Court documents will be references to page numbers within D.C. Doc. 1.

the lower court's order and Iosefo now appeals that ruling. (D.C. Doc. 18, attached as App. 2.)

STATEMENT OF THE FACTS

On August 25 and 26, 2012, the River City Roots Festival took place in Missoula. (January 4, 2013 Hr'g (Hr'g) at 3:44:20-35; App. 1.) Just outside the downtown parking garage, there was a specific area roped off with yellow caution tape for festival pedestrians and concessionaire booths. (Hr'g at 3:44:30-45; 3:46:00-3:48:00; 3:51:00.) Fiorentino, an off-duty Ronan Police Officer, was working as a security guard for Black Knight Security providing additional security for the event. (Hr'g at 3:43:30-3:44:10.) Fiorentino had been trained at the law enforcement academy and also received specific DUI training. (Hr'g at 3:56:00-3:57:00.) In the early morning hours of August 26, Fiorentino was stationed near the downtown parking garage; he was wearing a security uniform and carried a weapon, mace, and handcuffs. (Hr'g at 3:45:20-45; 3:58:40-3:59:10.)

Shortly after 3 a.m. on August 26, Fiorentino observed Iosefo drive through the exit of the parking garage through yellow caution tape that secured the pedestrian area; he was traveling the wrong way out of the garage. (Hr'g at 3:47:30-3:48:00; 3:49:00-3:49:35; 3:50:00-3:50:20; 3:59:30-4:00:25; 4:00-4:01:40; 4:14:30-4:15:00; 4:19:00-4:19:30.) Iosefo then attempted to turn his

vehicle and collided with a heavy plastic barricade; the impact moved the barricade and caused damage to his vehicle. (Hr'g at 3:48:00; 3:50:00-3:50:20; 4:00:25-4:02:05; *see also* State's Exs. 2-4 admitted during Hr'g at 4:21:30-4:24:00; 4:27:50-4:29:45.) Based on his observations of the area since 6 p.m., when Iosefo drove through the caution tape and then attempted to drive past the barricades, Fiorentino was concerned for the safety of pedestrians and that the artwork could be damaged. (Hr'g at 3:50:40-3:51:45.)

As Fiorentino approached Iosefo's vehicle, Iosefo continued to try and drive through the area. (Hr'g at 3:48:00-3:49:00; 3:51:50-3:53:30.) After he finally stopped, Fiorentino told Iosefo to remain in his vehicle until the police arrived, but Iosefo ignored his verbal commands and exited the vehicle and walked away. (Hr'g at 3:48:00-50; 3:52:20-3:52:50; 4:02:25-4:02:45.) When Fiorentino attempted to detain him, Iosefo pulled away from him and was agitated, waving his arms and yelling. (Hr'g at 3:48:40-45; 3:52:30-3:53:00; 4:03:00; 4:04:00-4:04:45.)

When Iosefo pulled away from him and ran into the garage, Fiorentino called 911 while continuing to direct Iosefo to return to his vehicle. (Hr'g at 3:52:00; 3:52:45-3:53:10; 4:02:00-4:02:20; 4:04:50-4:05:00; *see also* 911 Audio,

played during Hr’g at 4:08:00-4:10:00.)² Based on his demeanor, Fiorentino did not know what Iosefo was going to do. (Hr’g at 4:04:40-4:04:50.) Iosefo continued to be uncooperative and refuse Fiorentino’s requests while Fiorentino was talking to the dispatcher. (Hr’g at 4:02:00-4:03:00; 4:12:00; 4:13:00.) Fiorentino unsuccessfully tried to handcuff Iosefo in an attempt to detain him for police and warned he would put Iosefo on the ground. (Hr’g at 4:05:15-4:05:35; 4:08:40-4:09:00.) Iosefo’s counsel argued at the evidentiary hearing that Fiorentino also warned Iosefo he would draw his weapon if he did not stop and return to his vehicle. (Hr’g at 4:09:30-4:10:45.) Based on Iosefo’s driving and his erratic behaviors, Fiorentino was concerned for the safety of Iosefo and the public, and that was the reason he was trying to detain him. (Hr’g at 3:54:30-3:55:25; 4:12:20-4:12:30; 4:14:15-4:14:25.)

While answering the dispatcher’s question whether he thought Iosefo was intoxicated, Fiorentino replied “Um, I can’t tell. He backed-in the barricade here at the” (*See* 911 audio at 00:54-00:55; *see also* Hr’g at 4:08:00-4:12:00.) Fiorentino could not finish his answer because Iosefo was not complying with the directives and Fiorentino needed to turn his attention back to him. (*Id.*, *see also*

² Iosefo included an unofficial transcript of the 911 call in his reply brief to the district court (*see* Doc. No. 7) and as App. 2 of his opening brief to this Court; however, it does not appear an official transcript of the 911 call was submitted to the district court. The actual audio CD of the 911 call is a part of the record on appeal.

Hr'g at 4:11:30-4:12:00; 4:13:00-4:13:25.) After city police officers arrived, Iosefo was arrested for aggravated DUI, unlawful breath test refusal, and careless driving. (App. 1.)

Iosefo filed a motion to suppress on November 16, 2012, arguing he was unlawfully arrested because Fiorentino did not have sufficient probable cause to effectuate a citizen's arrest. (Doc. 1 at 66-73.) The City responded on November 23, 2012, and Iosefo replied on December 5, 2012. (Doc. 1 at 51-65 and 46-50, respectively.) An evidentiary hearing was held on January 4, 2013. (Doc. 1 at 41; Hr'g.)³ On January 23, 2013, the municipal court issued its order denying Iosefo's motion to suppress having concluded there was probable cause to support a citizen's arrest under Mont. Code Ann. § 46-6-502. (App. 1.) Pursuant to a plea agreement, Iosefo pled guilty to DUI, and the other two charges were dismissed; Iosefo reserved his right to appeal the court's denial of his motion to suppress. (Doc. 1 at 14-17.)

Iosefo filed a notice of appeal with the district court on February 15, 2013. (Doc. 1 at 1.) Iosefo filed his opening brief on March 5, 2013; the State responded on March 14, 2013; and Iosefo filed his reply and request for oral argument on

³ The January 4, 2013 municipal court evidentiary audio recording was added to the record on appeal by order of this Court on March 17, 2014. It is unclear whether the district court even considered the testimony presented to the municipal court or whether the district court relied upon only the 911 audio, the photographs, the parties' briefs, and oral arguments presented on May 8, 2013.

March 25, 2013. (Docs. 4, 6, 7.) The district court conducted an oral argument hearing on May 8, 2013. (Doc. 13.)⁴ On June 17, 2013, the district court issued its order affirming the city court's denial of Iosefo's motion to dismiss. (App. 2.)

SUMMARY OF THE ARGUMENT

The municipal court's findings of fact were not clearly erroneous and the trial court also correctly interpreted Mont. Code Ann. § 46-6-502 which sets forth no limitation upon the type of offense a citizen or out-of-jurisdiction officer may act upon when probable cause is present. Independent review of the record allows this Court to affirm the district court's ruling affirming the municipal court order since it reached the correct result.

The substantial evidence established Fiorentino had sufficient personal knowledge to lead a reasonable person to believe that Iosefo was committing or had committed an offense; Fiorentino observed Iosefo driving in a restricted area, through yellow caution tape and into a barricade and acting erratically and agitated while attempting to leave the scene. Therefor Fiorentino had probable cause to detain Iosefo.

The evidence also demonstrated that the situation presented possible dangers to Iosefo, others and property, thus justifying immediate action, and Fiorentino

⁴ No transcript of the district court oral argument has been filed with this Court.

acted appropriately under the circumstances. The trial court did not misapprehend the effect of the evidence and review of the record does not leave a definite or firm conviction that a mistake has been made.

STANDARD OF REVIEW

This Court reviews “cases that originate in justice court and are appealed to district court ‘as if the appeal originally had been filed in this Court.’” *State v. Marcial*, 2013 MT 242, ¶ 10, 371 Mont. 348, 308 P.3d 69 (citing *State v. Gai*, 2012 MT 235, ¶ 11, 366 Mont. 408, 288 P.3d 164). In an appeal from a justice court established as a court of record, the district court functions as an appellate court and the appeal is confined to a review of the record and questions of law. *See* Mont. Code Ann. § 3-10-115(1); *State v. Seaman*, 2005 MT 307, ¶ 10, 329 Mont. 429, 124 P.3d 1137.

To review a justice or city trial court’s findings and conclusions, this Court examines “the record independently of the district court’s decision.” *Marcial*, ¶ 10 (citing *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646). Rulings on a motion to suppress are reviewed by this Court to determine whether the lower court’s findings of fact are clearly erroneous and whether the lower court’s interpretation and application of the law are correct. *Marcial*, ¶ 10 (citing *State v. Spaulding*, 2011 MT 204, ¶ 13, 361 Mont. 445, 259 P.3d 793; *Seaman*, ¶ 10).

A factual finding is clearly erroneous if it is “not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if this Court’s review of the record leaves us with a definite or firm conviction that a mistake has been made.” *State v. Kelm*, 2013 MT 115, ¶ 17, 370 Mont. 61, 300 P.3d 687 (citation omitted).

ARGUMENT

I. THIS COURT MAY AFFIRM THE DISTRICT COURT’S CORRECT DECISION EVEN IF IT WAS REACHED FOR THE WRONG REASON.

Iosefo argues on appeal that the district court misinterpreted Mont. Code Ann. § 46-6-502, by claiming Fiorentino did not have probable cause to arrest Iosefo for nonjailable offenses. (Appellant’s Br. at 5-13.) Iosefo also challenges the district court’s findings of fact, suggesting the court misapprehended the evidence in support of probable cause the circumstances which required his immediate arrest. (*Id.* at 15-21.) However, as noted, in cases that originate in a court of limited jurisdiction that are appealed to district court, this Court reviews them “as if the appeal originally had been filed in this Court.” *Gai*, ¶ 11. *See also Marcial*, ¶ 10. Thus, this Court “undertake[s] an *independent* examination of the record apart from the district court’s decision and will ‘affirm the district court

when it reaches the right result, even if it reaches the right result for the wrong reason.”” *Gai*, ¶ 11 (emphasis added).

Therefore, this Court will review the evidence presented to the municipal court and may affirm the district court ruling since it reached the correct result. Accordingly, in its discussions and argument below, the State intends to focus primarily on the municipal court’s ruling and the evidence presented to the municipal court.

For clarification of the issue presented, the State argues that Iosefo improperly framed the issue presented as a request for this Court to determine “whether an arrest by an out-of-jurisdiction peace officer acting upon particularized suspicion” is legal. (Appellant’s Br. at 3.) Contrary to Iosefo’s argument, this Court did not leave this issue unsettled in *State v. Updegraff*, 2011 MT 321, 363 Mont. 123, 267 P.3d 28. Rather, this Court concluded that development of probable cause based on the officer’s lawful presence under the community caretaker doctrine was appropriate. *Updegraff*, ¶ 58. As stated, the issue before this court is whether Fiorentino, acting as an out-of-jurisdiction peace officer under the citizen arrest statute, had probable cause to arrest Iosefo and whether existing circumstances warranted immediate action.

II. APPLICABLE LAW

In Montana, a police officer can conduct an investigative stop based on particularized suspicion in order to determine whether there is probable cause to arrest. *See* Mont Code Ann. § 46-5-401. If a peace officer has probable cause to believe that a person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest, that officer may arrest that person. *See* Mont. Code Ann. § 46-6-311(1). However, these same standards do not apply to a peace officer out of his or her jurisdiction. *See State v. McDole*, 226 Mont. 169, 172, 734 P.2d 683, 685 (1987) (an out-of-jurisdiction officer has the same arrest capabilities as a private citizen); and *State v. Hendrickson*, 283 Mont. 105, 108, 939 P.2d 985, 687 (1997). An out-of-jurisdiction police officer may only detain or arrest a person based on probable cause and finding the existing circumstances require immediate arrest. *See State v. Williamson*, 1998 MT 199, ¶¶ 19-20, 290 Mont. 321, 965 P.2d 231; *Updegraff*, ¶¶ 45, 46, 50, 52 (an out-of-jurisdiction peace officer does not have any less authority to arrest than a private citizen).

Pursuant to Mont. Code Ann. § 46-6-502(1), “a private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person’s immediate arrest.” Probable cause to arrest is generally established if the facts and

circumstances within an officer's personal knowledge, or related to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense. *See* Mont. Code Ann. § 46-6-311(1); *Williamson*, ¶ 12 (citations omitted); *Updegraff*, ¶ 50. When a private citizen is making an arrest, the probable cause test is "whether a reasonable person, under personally known facts and circumstances, is warranted in believing that someone is committing or has committed an offense." *State v. May*, 2004 MT 45, ¶ 18, 320 Mont. 116, 86 P.3d 42, (citing *Williamson*, ¶ 16). *See also State v. Schubert*, 2010 MT 255, ¶ 17, 358 Mont. 286, 244 P.3d 748.

A probable cause determination must be based on an assessment of all relevant circumstances, evaluated in light of the knowledge of a trained law enforcement officer. *Williamson*, ¶ 21 (citation omitted). "Probable cause is evaluated in light of a trained law enforcement officer's knowledge, taking into account all the relevant circumstances." *Williamson*, ¶ 12 (citing *City of Missoula v. Forest*, 236 Mont. 129, 132, 769 P.2d 699, 701 (1989)). *See also Updegraff*, ¶¶ 48, 52 (officers "do not suddenly forget all their training and experience" if they are out of their jurisdiction).

III. THE TRIAL COURT’S FINDINGS WERE NOT CLEARLY ERRONEOUS.

The municipal court’s findings were properly supported by substantial evidence, the court did not misapprehended the effect of the evidence, and review of the record does not leave a definite or firm conviction that a mistake has been made.

Iosefo mischaracterizes an isolated statement Fiorentino made while on the phone with the dispatcher as proof-positive that he “denied personal knowledge” of probable cause when he stated he did not know if Iosefo was drunk. (*See* Appellant’s Br. at 4.) When taken in context, it is clear that during the exchange Fiorentino’s reply to the dispatcher was interrupted and he did not finish explaining his observations. (App. 2 at 2.) Fiorentino stated he could not tell whether Iosefo was intoxicated; he did not state Iosefo was sober.

Moreover, taking his statement in isolation precludes consideration of the circumstances of the events and the fact that Fiorentino was distracted with Iosefo who was ignoring commands, arguing with him, and acting in an agitated manner. Based on his personal observations of Iosefo driving through caution tape, striking a parking barrier, and then ignoring his requests to stay, and given the personally known facts and circumstances, Fiorentino was warranted in believing that someone was committing or had committed an offense. *See May*, ¶ 18; *Williamson*, ¶ 16; and *Schubert*, ¶ 17.

At the very least, Fiorentino had probable cause to believe Iosefo had driven carelessly and was leaving the scene of an accident. *See, e.g.*, Mont. Code Ann. §§ 61-8-716, 61-7-107 to 108. In addition, and based upon Iosefo's erratic behaviors, Fiorentino was also concerned for the safety of others and potential for further property damage. The trial court did not misjudge the evidence or err by considering the entire circumstances rather than just an isolated, unfinished statement.

The facts presented here are similar to *McDole*, where this Court affirmed an arrest by an out-of-jurisdiction officer based on citizens' reports of erratic driving and a hit and run accident. *McDole, supra*. This Court found that "there is no question that both the private citizen who observed Mr. McDole's erratic driving and the private citizen involved in the accident with Mr. McDole could have arrested Mr. McDole pursuant to Montana's citizen arrest statute." *McDole*, 226 Mont. at 173, 734 P.2d at 685.

This Court again found observations of "erratic driving" by an out-of-jurisdiction officer as sufficient probable cause for a citizen to initiate a traffic stop. *Hendrickson*, 283 Mont. at 109, 939 P.2d at 987-88. Relying on *McDole*, this Court concluded that observations of a motorcycle driver having trouble controlling his bike gave the out-of-jurisdiction officer authority to arrest as a private citizen and to relate his subsequent observations of intoxication to law

enforcement. *Hendrickson*, 283 Mont. at 109, 939 P.2d at 987-88. The Court, however, concluded the out-of-jurisdiction officer acted beyond the scope of citizen arrestor when he did not turn Hendrickson over to city police who arrived at the scene and suppressed the evidence of field sobriety tests done after the driver should have been turned over to responding law enforcement. *Hendrickson*, 283 Mont. at 110-12, 939 P.2d at 988-89.

A citizen working as a flagger who observed a vehicle swerving across traffic lanes after she was alerted by another flagger that a drunk driver may be approaching, had sufficient probable cause to detain the driver despite the fact the citizen did not confirm presence of the smell of alcohol until she approached the vehicle and talked with the driver. *See Schubert*, ¶ 21. This Court confirmed that consideration of all the facts and circumstances was appropriate when determining if the flagger had probable cause to detain the driver (*i.e.*, time of day, trusted source of information she received, close proximity of a bar, personal observations of poor driving, concern for safety of others). *Schubert*, ¶¶ 20, 21. Similarly, in *Sunford*, speeding was sufficient cause to detain a driver despite the fact evidence of intoxication was not observed until close contact was made with the driver. *Sunford*, 244 Mont. at 415, 796 P.2d at 1086.

Just as with *Schubert*, *Sunford*, and *Hendrickson*, Fiorentino's personal observations at 3 a.m. of Iosefo carelessly driving into a prohibited area through

yellow caution tape, striking a parking barrier, and continuing to try to leave the area, provided more than sufficient facts and circumstances for a reasonable person to believe an offense had been or was being committed. Pursuant to this Court's jurisprudence, Fiorentino did not need to know for certain that Iosefo was intoxicated to detain him; evidence of an "offense" being committed was sufficient. Clearly Fiorentino's observations established at least the offenses of careless driving or leaving the scene of a damage accident.

Moreover, it was proper to consider that although Fiorentino was acting under the citizen arrest statute, his knowledge, training and experience as a law enforcement officer was relevant to how Fiorentino interpreted Iosefo's actions. *See Updegraff*, ¶¶ 48, 52 (officers "do not suddenly forget all their training and experience" if they are out of their jurisdiction); and *Williamson*, ¶ 12 ("Probable cause is evaluated in light of a trained law enforcement officer's knowledge, taking into account all the relevant circumstances."). Fiorentino's experience as a law enforcement officer would keen him to additional circumstances of the event that were also relevant and thus warrant immediate action for safety purposes (*i.e.*, 3 a.m., festival taking place downtown, Iosefo's agitated state and attempt to evade detention).

The need for immediate action by Fiorentino is also the same as that described in *McDole*, *Hendrickson*, *Schubert* and *Sunford*. For instance, in

McDole, this Court stated that the erratic driving and hit and run “clearly required Mr. McDole’s immediate arrest in order to prevent his getting in additional accidents and possibly seriously injuring someone.” The Court added that had the “officer had not arrested Mr. McDole, it is quite possible that he might have commenced driving again in his intoxicated condition and critically injured himself or others.” *McDole*, 226 Mont. at 173, 734 P.2d at 686.

The same can be said for the dangers created by Iosefo’s concerning driving and demeanor with Fiorentino. Iosefo argues that since he was out of the vehicle, there was no more danger present. This circular argument fails to recognize this Court’s jurisprudence and the premise upon which the citizen arrest statute was built--public safety and the *prevention* of dangers to others.

The statute contemplates a public safety purpose, not a criminal investigation purpose. *It grants private persons the power to take another into custody in the interest of public safety*, but mandates that the arrestee be promptly turned over to law enforcement, thereby allowing the normal processes and safeguards of the criminal justice system to take effect.

Updegraff, ¶ 33 (emphasis added).

Just like the out-of-jurisdiction officers in *McDole* and *Hendrickson*, Fiorentino made a valid arrest which was “in harmony” with Montana’s criminal statutes which intend to limit injury of person or property. Just as in *Hendrickson*, *Schubert*, *Sunford*, and *McDole*, Fiorentino, the “citizen arrestor,” properly stopped

Iosefo for committing an offense (after noting his erratic driving and agitated demeanor) and out of concern for the safety of persons and property.

Iosefo's discussion about Fiorentino allegedly drawing his weapon and warnings about "gun-toting" private security guards is not relevant to whether Fiorentino had probable cause and is not supported in the record. First, Fiorentino did not draw his weapon on Iosefo. (*See* App. 1 at 2; Hr'g at 4:14:10.) Second, it is clear from the testimony of both Fiorentino and the responding city officer that Iosefo ignored all Fiorentino's requests to remain and it took at least three commands from the responding officer for Iosefo to finally comply. Therefore, under the facts of this case, it does not appear that a threat of force as alleged by Iosefo affected him in any way.

Substantial credible evidence supported the finding that based on Fiorentino's observations there was probable cause to detain Iosefo and the circumstances justified the need for immediate action. Iosefo's erratic driving through a restricted garage at 3 a.m. with disregard for the yellow caution tape and parking barriers, together with his agitated and noncompliant behaviors certainly established probable cause that he had committed an offense, and it was reasonable for Fiorentino to fear for the safety of Iosefo and others in the vicinity. It was appropriate to immediately attempt to detain Iosefo given his prior attempts to drive his vehicle through a restricted area. His refusal to abide by Fiorentino

requests and his actions of waving his arms and yelling also contributed to the concern that he was not acting in a safe manner and immediate restraint until a city officer could take custody was a proper course of action.

The Municipal Court did not misapprehend the testimony of Fiorentino. Indeed, this Court has consistently noted that the fact finder is uniquely in the best position to judge the credibility of witnesses and thus this Court defers to the trial court regarding the credibility of witnesses and the weight to be accorded their testimony. *State v. Worrall*, 1999 MT 55, ¶ 50, 293 Mont. 439, 976 P.2d 968; *State v. Lally*, 2008 MT 452, ¶ 24, 348 Mont. 59, 199 P.3d 818. The order dismissing Iosefo's motion to dismiss does not leave a definite and firm conviction that a mistake was made.

IV. MONTANA CODE ANNOTATED § 46-6-502 WAS CORRECTLY INTERPRETED AS NOT BEING LIMITED TO ONLY “JAILABLE” OFFENSES.

Iosefo provides no authority to support his contention that an arrest pursuant to Mont. Code Ann. § 46-6-502 is limited to any type of offense (*i.e.*, “jailable” offense). The plain language of Mont. Code Ann. § 46-6-502(1) provides that “[a] private person may arrest another when there is probable cause to believe that the person is committing or has committed *an offense* and the existing circumstances

require the person's immediate arrest. The private person may use reasonable force to detain the arrested person.” (Emphasis added.)

This Court is “guided by the long-held maxim that legislative intent must first be determined from the plain words used in the statute, and when that is possible no other means of interpretation are proper.” *State v. Cooksey*, 2012 MT 226, ¶ 32, 366 Mont. 346, 286 P.3d 1174 (citing *City of Missoula v. Cox*, 2008 MT 364, ¶ 9, 346 Mont. 422, 196 P.3d 452). Courts may not disregard the plain language of a statute and are to ascertain and declare what is in “terms or in substance contained” in a statute, and not to insert what is omitted or omit what is inserted. *Id.* See also Mont. Code Ann. § 1-2-101. The plain language of Mont. Code Ann. § 46-6-502 provides no comment on the type of offense a citizen may act upon; the only limitation on a citizen arrest is that the circumstances must justify immediate action.

This Court has confirmed that probable cause for an arrest under Mont. Code Ann. § 46-6-502 may be established for a number of offenses, not all of which were “jailable offenses.” See, e.g., *McDole, supra* (erratic driving and hit and run accident justified arrest under Montana’s citizen arrest statute); *State v. Sunford*, 244 Mont. 411, 796 P.2d 1084 (1990) (airport security guard properly detained driver for speeding under citizen arrest statute); *Hendrickson, supra* (out-of-jurisdiction officer had authority to perform traffic stop based on

observations of erratic driving); and *Schubert, supra* (flagger properly detained driver after getting report of possible drunk driver and then observing the vehicle swerve at least three times across both lanes and she feared for the safety of others).⁵

While Updegraff was ultimately arrested for DUI, this Court explained that an out-of-jurisdiction officer had authority to approach the defendant pursuant to the community caretaker doctrine *and* because Updegraff was parked in a “day use only” area at night, he “was committing a misdemeanor. *See* §§ 23-1-102(4), -106, MCA. If so, [the officer] had probable cause of *an offense* upon seeing his parked car.” *Updegraff*, ¶ 55 (emphasis added).

As noted in the above-cited cases, there is no specification in Mont. Code Ann. § 46-6-502 that a citizen may arrest a person only if they are committing a “jailable” offense. The plain language of that provision clearly states that all that is required is probable cause to believe a person is committing or has committed an offense and that the existing circumstances require the person’s immediate arrest. Mont. Code Ann. § 46-6-502(1). Expecting a citizen to know what crimes

⁵ Although *McDole* and *Sunford* were decided prior to the 1991 amendment to Mont. Code Ann. § 46-6-502, the Court’s rationale and conclusions in those cases still illustrates that the citizen making the arrest need only believe an offense is being committed and also explains when immediate action is required.

constitute a “jailable offense” under the law is not reasonable. Rather, as this Court has explained, the citizen’s arrest provision is premised on public safety as evidenced by the requirement that detainment for an offense is immediately necessary under the circumstances. *See Updegraff, supra*.

Notwithstanding the controlling plain language of the statute, this Court’s careful review of the history behind the citizen’s arrest statute in *Updegraff* also refutes Iosefo’s argument. The 1991 Legislative amendment to Mont. Code Ann. § 46-6-502 changed the provision in a number of respects, including: deleting the distinction between misdemeanor and felony offenses and the requirement that the offense take place in the citizen’s presence; substituting “probable cause” for “reasonable grounds;” and adding the provision for circumstances that require immediate arrest. *See* 1991 Montana Laws, ch. 800, § 40, at 3027; *Updegraff*, ¶ 32. *See also Schubert*, ¶ 17 n.2.

Significant to Iosefo’s argument, the 1991 Commission Comments specifically noted that “[t]he word, ‘offense’ used in subsection [(1)] *is broad enough* to allow a citizen to arrest for misdemeanors and ordinance violations as well as felonies committed in his presence.” 1991 Commission Comments, Mont. Code Ann. Ann. § 46-6-502 (emphasis added). Clearly, the Legislature contemplated that citizens were authorized to detain/arrest another for offenses and ordinances that were nonjailable.

Iosefo's reliance on *State v. Bauer*, 2001 MT 248, 307 Mont. 105, 36 P.3d 892, is not persuasive. (See Appellant's Br. at 9.) Significant to this Court's holding in *Bauer* was the absence of any evidence that Bauer constituted a danger to himself or others and the officers involved testified that Bauer was cooperative and compliant after he was stopped. *Bauer*, ¶ 31. This Court also noted that prior to taking Bauer to the police station, the officer was aware the only applicable offense was an MIP. *Bauer*, ¶ 32.

The offense at issue in *Bauer*, an MIP, is quite different than the offenses at issue here: careless driving, leaving the scene of an accident. Also, the risk to others that a careless driver may pose is quite different from a juvenile on foot. Notably, this Court used the example of "concern for the safety of the offender or the public," as sufficient circumstances to justify arrest. *Bauer*, ¶ 33. Here, Fiorentino observed Iosefo drive carelessly and wreck into parking barriers and then behave erratically and agitated when he asked him to remain at the vehicle. Clearly, these observations qualify as additional circumstances that were not present in *Bauer* and which justified immediate action.

Based on *McDole*, *Hendrickson*, and *Schubert*, evidence of careless or erratic driving were appropriate and sufficient probable cause to for a citizen or out-of-jurisdiction officer to initiate a stop. The same can be said for the circumstances here where Fiorentino observed Iosefo drive through yellow caution

tape, back his car into a barricade, and attempt to leave a damage accident. The offense for which Iosefo was cited or pled guilty to is not relevant to Fiorentino's observations and present sense impressions that formed the probable cause to detain Iosefo. *See May*, ¶ 8 (probable cause depends on facts and circumstances known to a reasonable person that warrant a belief that someone is committing or has committed an offense). Under the facts and circumstances presented here, Fiorentino had probable cause to detain Iosefo and the municipal court correctly interpreted and applied Mont. Code Ann. § 46-6-502(1).

CONCLUSION

Iosefo's motion to suppress was properly denied and the district court order affirming that denial should also be affirmed.

Respectfully submitted this 21st day of March, 2014.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
KATIE F. SCHULZ
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. James P. O'Brien
O'Brien Law Office, P.C.
P.O. Box 7936
Missoula, MT 59801-7936

Mr. Gary Hendricks
Senior Deputy Missoula City Attorney
435 Ryman
Missoula, MT 59801

DATED _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,186 words, excluding certificate of service and certificate of compliance.

KATIE F. SCHULZ

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 13-0536

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

MARTIN MULIPA IOSEFO,

Defendant and Appellant.

APPENDIX

Opinion and Order dated January 23, 2013Appendix 1

Order Re: Municipal Appeal dated June 17, 2013Appendix 2